IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 365 of 1989
With
CRIMINAL APPEAL No. 371 of 1989

For Approval and Signature:

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CHIMANLAL F KOTHARI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
Cr.A. No.365/89

Mr KJ SHETHNA for Appellant(s) : 1,
Mr L.R. Pujari, APP for Opponent(s) : 1

Cr.A.No.371/89

Mr M.J. Buddhabhatti for appellants

Mr L.R. Pujari, APP for opponent

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CORAM : HONOURABLE MR.JUSTICE MD SHAH

Date : 05/10/2007

COMMON ORAL JUDGMENT

1. Since these appeals arise out of the common judgment and order of conviction and sentence dated 29.5.1989 delivered by the learned Special Judge, Ahmedabad City in Special Case No.7 of 1988, they are being decided by this common judgment.

2. By the above referred judgment and order, the learned Special Judge found both the appellants guilty of offence under section 165-A of Indian Penal Code and appellant-accused No.1, Navinchandra Keshavlal Desai was sentenced to undergo rigorous imprisonment for a period of nine months and a fine of Rs.500/- and in default, three months' rigorous imprisonment,while appellant-accused no.2, Chimanlal Fulchand Kothari was sentenced to undergo rigorous imprisonment for a period of nine months. The muddamal articles were also ordered to be confiscated.

3. The facts of the case of the prosecution in brief are as under:

The complainant-Rajnikant Shivshankar Raval, at the relevant time, was serving as Special Auditor, Grade I, in Co-operative Societies with The Gujarat Industrial Co-operative Bank Ltd. (for short, "the Bank"), Ashram Road, Ahmedabad. The Bank has a branch at Morbi. Being Auditor of the bank, he has to audit various branches of the Bank situate in different parts of Gujarat. As part of his duty, on 19th November, 1985, the complainant along with one clerk, B.S. Rathod visited the Morbi Branch of the Bank for the purpose of audit. Appellant no.1-N.K. Desai was serving as peon in the said branch and appellant no.2- C.F.Kothari was serving as clerk-cum-cashier and he was incharge Manager at the relevant time. The schedule of the audit programme of the complainant was from 19.11.1985 to 24.11.1985. During the audit, the complainant came across one office copy of leave fare voucher of Rs.1510-40 submitted by accused no.1. The complainant asked for the original bills with the ticket voucher from accused no.2, C.F. Kothari (incharge Manager). Accused no.2 informed the complainant that the

original voucher and tickets are lying with the Regional Office at Rajkot. The complainant demanded the said originals from the Regional Office at Rajkot as well as from the Morbi branch, but both the offices have not produced the same before the complainant. It is alleged by the complainant that both the offices have wasted time in correspondence but did not produce the original tickets before the complainant during the period of audit. Therefore, accused no.2 told the complainant that he will send the original tickets to the complainant at Ahmedabad. Thereafter repeated demands were made by the complainant for the original tickets. The complainant had suspected the genuineness of the tickets. Thereafter, on 1.5.1986, accused no.2-Kothari telephoned the complainant and requested that "accused no.1 be saved. He will please you. I will send him to you tomorrow, please complete his work. Do not do anything further in the matter".

It is also alleged that in pursuance of the telephonic talk between the complainant and accused no.2, Desai, accused no.1 had gone to the office of the complainant at 12-00 noon on 2.5.1986. Accused

no.1 told the complainant that he wanted to talk to him and he requested the complainant to accompany him to the ground floor. The complainant went with him to the downstairs where accused no.1 told him that as per the telephonic talk accused no.2 had with the complainant, he (accused no.1) was there before the complainant and that he is a poor man and that his work be done. Thereafter he showed one packet wrapped in paper to the complainant and insisted on the complainant for accepting the same. The complainant refused to accept the packet and told him that he will act according to law. Thereupon, accused no.1 asked residential address of the complainant and also told him that he will reach the residence of the complainant at 8.p.m. Accordingly, accused no.1 wrote down the address on the packet itself. It is also alleged in the complainant that accused no.1, at that time also requested the complainant to accept the said gift packet and also requested to save him from the LTC case. Thereafter, accused no.1 left the office of the complainant.

4. According to the complainant, as he did not

want to accept the said gift, at 5.p.m. he went to the Anti-Corruption Bureau Office at Ahmedabad and lodged complaint before Police Inspector, Anti-Corruption Bureau, Ahmedabad. Police Inspector, ACB recorded his complaint and thereupon along with the complainant and his staff members went in a jeep to Bapunagar cross roads from where they called 2 panchas and the complaint was read over to them, they were explained everything and preliminary panchnama was drawn in the jeep itself. After drawing the preliminary panchnama, they all proceeded on foot towards the house of the complainant. As per the instructions of the Police Inspector, ACB, the complainant, panchas and other members of the raiding party took their positions inside and outside the house of the complainant. At about 9 p.m., accused no.1 came to the house of the complainant with the above referred gift box and handed it over to the complainant and the complainant accepted the same. Thereupon, as per the instructions, the complainant had signalled the police inspector, ACB and other members of the raiding party who went to the room where accused no.1 had handed over the gift packet to

the complainant. The Investigating Officer made enquiry and raided the premises of the complainant and necessary formalities of drawing the second part of the panchnama, recording statements of the witnesses etc. were completed. As the raid was successfully carried out, first information report was lodged against accused no.1. Accused no.1 was arrested on the same day. On the FIR being lodged, P.I., ACB investigated the matter, recorded statements of the panchas, Branch Manager, Morbi and others and on completion of the investigation, arrested accused no.2 also and produced him before the court along with the charge sheet against both the accused no.1 and 2, on 9.5.1988. Thereupon charge was framed against both the accused on 27.1.1989 and the case was registered as Special Case No.7 of 1988. The accused pleaded not guilty to the charge and claimed to be tried. To prove its case, the prosecution examined six witnesses as under:

(i) PW 1, Rajnikant Shivshankar Raval, complainant Exh.9

(ii) PW 2, Arunkumar Trivedi Exh.40

(iii) PW 3, Babubhai Mohanbhai, panch Exh.47

(iv) PW 4, Mathursingh Ajmalsingh,PSI Exh.49

(v) PW 5, Shailesh Mahendrabhai, Exh.51

(vi) PW 6, Kishoresingh Babusingh Rathod,IO Exh.54

5. In support of the oral evidence, the prosecution also produced documentary evidence like FIR, panchnama, bill of the clock (muddamal packet) and other correspondence which took place between the office of the complainant and offices of Morbi branch of the bank as well as Rajkot branch. After completion of the evidence of the prosecution, further statement of the accused under section 313 of the Criminal Procedure Code was recorded by the learned Special Judge. After hearing all the arguments of the learned advocates of both the sides, learned Special Judge, by his judgment and order as stated above, convicted both the accused as aforesaid. Hence these appeals are preferred by both the accused.

6. Heard Mr M.J. Buddhabhatti, learned advocate for the appellant-accused no.1, N.K. Desai and Mr

K.J. Shethna, learned Sr.counsel appearing for appellant-accused no.2, C.F. Kothari. Learned advocate Mr Buddhabhatti, submitted that the charge framed by the learned trial Judge is absolutely defective and by doing so, the trial court has committed grave error and has wrongly convicted accused no.1. It is also submitted by him that in a case under section 165-A of IPC, the prosecution must prove its case beyond reasonable doubt and no legal presumption could be drawn against the accused like the cases under the provisions of Prevention of Corruption Act. It is submitted by Mr Buddhabhatti that the prosecution has failed to prove its case beyond reasonable doubt as there are major contradictions in the oral evidence of the complainant as well as the panch witnesses.

6. Mr K J Shethna, Learned senior advocate appearing for appellant no.2 made an attempt to show that there are major contradictions as well as omissions in the evidence of the complainant. He submitted that these contradictions and omissions are

not minor in nature and are fatal to the case of the prosecution. He submitted that the trial court has not considered the same and by that, the trial court has committed error in convicting the accused. It is also submitted by Mr Shethna that it has come out from the evidence of PW 1, the complainant and PW 2, Arunkumar Trivedi, the Incharge Manager that accused no.2 is not at all concerned with the accused no.1 or his leave fare bill and hence the question of asking for favour from the complainant for doing any wrong thing by accused no.2 does not arise. It is also submitted that if any wrong is committed, then it is done by accused no.1 and so there is no reason for accused no.2 to abet accused no.1 in giving bribe to the complainant.

7. Mr L.R. Pujari, learned APP submitted that the prosecution has proved its case beyond reasonable doubt by examining PW 1-the complainant and PW 2-Incharge Manager of the Bank, PW 3 panch witness and PW 4-Investigating Officer as well by examining the documentary evidence and hence the judgment and order passed by the learned trial Judge is legal and proper

and it does not call for any interference by this court and the appeals deserve to be dismissed.

8. Before dealing with the arguments advanced by the learned advocates for the appellants and the learned APP, it is required to be noted that both the accused were charged for the offence under section 165-A of IPC and hence it is the bounden duty of the prosecution to prove its case beyond reasonable doubt against the accused. It is pertinent to note that to prove a charge under section 165-A, the legal presumption cannot be drawn against the accused like done in cases under the provisions of Prevention of Corruption Act and hence the prosecution must prove its case against the accused beyond reasonable doubt. In the light of the above, this court has minutely scrutinised the evidence of the witnesses and the following facts emerge from the evidence of the witnesses:

9. It is an admitted fact that accused no.1 was a peon at the relevant time and the complainant was Class II officer, Grade I, Auditor. Both are

government servants. It is also an admitted fact that the leave fare bill of Rs.1510-40 of accused no.1 was granted by the Regional Office of the Bank at Rajkot and as far as Morbi Branch of the bank is concerned, it has only recommended and forwarded the leave fare bill produced and submitted by the accused no.1 along with the documents pertaining to his travel. So far as verification of the documents are concerned, it is for the Regional Office to verify the same and if the documents are found genuine, the Regional Office sanctions the bill. Here, in this case, the Regional Office has, after verifying the documents, granted the leave fare bill and the amount was also received by accused no.1. In light of this, it is necessary to discuss the evidence of PW 1-complainant, Rajnikant Shivshankar Raval at Exh.9.

10. According to the evidence of this witness, he and one clerk B.S. Rathod visited Morbi branch of the Bank for the purpose of audit from 19.11.1985 to 24.11.1985. During this audit period, he had come across the leave fare bill of accused no.1 and he had

some doubts about the genuineness in the numbers mentioned in the tickets of S.T. Bus produced by accused no.1 and hence, the complainant demanded for the original tickets from accused no.1 through accused no.2 from the regional office at Rajkot. The complainant also demanded the original tickets from the regional office for which he received a reply that within one or two days they will send the original tickets to him. This witness specifically admitted in his evidence that during his audit period from 19.11.1985 to 24.11.19985, he did not get the original tickets for inspection from the regional office and as the audit work was over, he left Morbi and at that time accused no.2 told him that he will send the original tickets to him at Ahmedabad office. As per the evidence of the complainant, as promised, the original tickets were not received in his office at Ahmedabad, and therefore, he has written letter to Morbi branch for the same. A perusal of the entire evidence of the complainant reveals that prima facie, it is found that the original tickets were lying with the regional office, Rajkot. In this connection, if the documentary evidence at Exh.13 is

perused, it is evident that the Managing Director of the Gujarat Industrial Cooperative Bank Ltd., by his letter dated 5.3.1986 asked the Regional Officer, Rajkot Region to send the original tickets in question to the Special Auditor, Ahmedabad. Document at Exh.29 is also a letter dated 1.3.1986 which is written by the complainant to the Regional Manager, Rajkot. If we peruse these documents, it is crystal clear that during the audit period of Morbi Branch, the original leave fare bill and original tickets of S.T. Bus in reference to the LTC claim of accused no.1 were called for from the regional office, Rajkot. It also transpires from the above referred communications that the original documents were lying with the regional office, Rajkot. It is also mentioned in the said letter that in spite of several reminders, the regional office, Rajkot did not send the originals to the complainant. Exh.39 is a letter dated 3.4.1986 written by accused no.2 to the complainant in which also it was specifically mentioned that in response to the letter dated 1.3.1986, (of the complainant), the Regional Manager, Rajkot office has not sent the original tickets as

demanded and hence he again informed the complainant that the original tickets are lying with the Rajkot office and not with the Morbi office and hence the question of sending the original tickets by the Morbi office does not arise. From the above referred documents and correspondence, it transpires that the original tickets might have been produced by accused no.1 along with the leave fare bill and might have been lying with the regional office at Rajkot. As per the evidence of the complainant also, he was not able to trace out whether the original tickets were lying with the regional office at Rajkot or with the Morbi office. The complainant, being an Auditor, must have made thorough enquiry about the whereabouts of the original tickets. No doubt, so far as this case is concerned, the original tickets are not much relevant but the root of the case started because the original tickets were not received by the complainant during the audit and hence it is very relevant in deciding the case of the prosecution.

11. The complainant, in his chief examination, has stated that he received a telephone call from

accused no.2 on 5.5.1986 and as per the telephonic conversation, accused no.2 told him that accused no.1-N.K. Desai will be meeting the complainant in Ahmedabad on the next day and he requested to dispose of the LTC case of accused no.1 for which accused no.1 will do the needful to please the complainant. During the cross-examination, PW 1 has specifically stated that as per the telephonic conversation dated 5.5.1986, accused no.2 only told him that accused no.1 will be coming to see the complainant in connection with the leave fare bill case. In no uncertain terms, this witness has stated in his evidence that except this, no talk has taken place between him and accused no.2. In the circumstances, it was the bounden duty of the concerned Public Prosecutor to have got it clarified by putting questions to this witness-complainant whether earlier version on the telephonic conversation was right or the latter version was right. Unfortunately, this exercise has not been carried out by the Public Prosecutor or by the court below and hence serious doubt is created as to whether accused no.2 had asked the complainant to favour accused no.1 and

whether he told the complainant that accused no.1 will please the complainant if such favour is granted. As per the evidence of PW 1, during the audit period, accused no.2 rendered full cooperation and tried to smoothen the work by assisting the complainant in solving objections/queries etc. raised by the complainant.

12. The complainant has specifically stated on oath before the court that on asking, accused no.2-Kothari immediately produced the copy of the bill of accused no.1 without any hesitation. In the complaint-Exh.17, it is not narrated by the complainant that accused no.1 asked the complainant to accept the gift he has brought for the complainant and as the complainant refused to accept the said gift, accused no.1 told the complainant that Kothari (accused no.2) very much wanted to give the said gift and in fact it was the choice of accused no.2. He also admitted that in police statement he has not narrated that accused no.1 told him to accept the gift (clock) and pass the false leave fare bill of accused no.1. The complainant has, for the first

time, narrated this version before the court and this is a major omission/contradiction between the complaint and the evidence. Further, as per the evidence of the complainant, if any action was proposed to have been taken by the bank for producing false tickets, then it ought to have been taken against accused no.1, and in any case, accused no.2 is not liable for any action.

13. To prove the telephonic talk which has taken place between accused no.2 and the complainant, the prosecution examined PW 2, Arunkumar Trivedi at Exh.40. This witness, in his evidence, has stated that he heard accused no.2, Kothari telling the complainant on phone that he had sent an extract of 22 columns of the telephone register and requested him (the complainant) to close the LTC bill case of the peon, accused no.1, as he (accused no.1) is a poor man. This witness was incharge Branch Manager at the relevant time and according to the case of the prosecution, he was very much present when accused no.2 telephoned the complainant. However, from the evidence of this witness, nothing has come

out to corroborate the version that accused no.2 had told the complainant that accused no.1, peon-N.K.Desai "would please the complainant". It is also pertinent to note that from the evidence of this witness it is found that in connection with the leave fare bill of accused no.2, many times there were telephonic talks between accused no.2 and the complainant. From the evidence of this witness, at the most, the prosecution can only prove that accused no.2 had telephoned the complainant on 1.5.1986 but nothing has come out from the evidence of this witness to prove that accused no.2 had requested the complainant regarding the so-called favour and offer of bribe to the complainant.

14. Now, as regards the probability of the incident in question is concerned, from the perusal of evidence of PW 1, it is an admitted fact that PW 1 is a Class II officer, Grade I -Auditor and accused no.1 is a peon. As stated earlier, according to his own evidence, PW 1 stated that as per the telephonic talk between accused no.2 and the complainant on the

previous day of the incident in question, accused no.1 had visited his office with one packet wrapped in paper and accused no.1 requested him to go with him to the ground floor. It has also come out from the evidence of this witness that when accused no.1 reached the table of the complainant, it was office time and staff members as well as Mr Mehta, superior officer of the complainant was also present, and in the presence of these persons, accused no.1 went with the box, requested the complainant to accompany him to the ground floor where they could talk. Under normal circumstances, the story is not believable as accused no.1, a peon will not dare to ask a Class II Officer to accompany with him to the ground floor as he wanted to speak to him, and the complainant cannot be expected to have gone with the peon. This conduct of accused no.1 is improbable and not natural. Furthermore, it is stated on oath by the complainant that when he went with accused no.1 to the ground floor, accused no.1 insisted him to accept the gift box and he refused to accept. Then accused no.1 told him that Kothari (accused No.2) had specially sent the gift for the complainant

and Kothari Saheb wanted the complainant to accept it and he must accept it. Again, the complainant has specifically denied to accept the said gift in spite of insistence of accused no.2 and hence he asked accused no.1 to go to the complainant's residence. For the sake of argument, even if assuming that for granting favour to accused no.1, accused no.2 sent the gift (bribe) to the complainant, then what should be the natural conduct of accused no.1, as he was a peon and the complainant was Class II officer. Simply accused no.1 could have handed over the packet to the complainant and at the most he could request the complainant to look into his LTC case. It is highly improbable that accused no.1, peon told so many words to the complainant and insisted him to accept the gift. Further, it is stated by the complainant that he was suspicious that accused no.2 (Kothari) and accused no.1 (N.K. Desai) might have arranged to trap him, as the box brought by accused no.1 was wrapped in paper and on thathis (complainant's) residential address was noted down. This version of the complainant leads us to believe that in presence of his superior officer Mr Mehta

and other staff members, accused no.1 came with the gift box and he might have thought not to accept the same in front of others and as the complainant, suspected that some trap might have been arranged by both the accused persons, he did not accept the said packet/box and instead, he went to the ACB office and lodged the complaint. It is also very strange that though the complainant refused to accept the gift from accused no.1, at the request of accused no.1, he gave address of his residence. It is also pertinent to note that even though the incident took place at 11.00 a.m. in the morning and Mr Mehta, his superior officer was present in the office, he did not disclose the said fact to Mr Mehta. It is also rather strange that till 5 p.m., the complainant was in the office but he has not thought of lodging the complaint. But at 5 p.m. he decided to go to the office of the ACB. Thus, the evidence of the complainant and his conduct creates serious doubts whether to favour accused no.1, bribe in the form of gift was offered to the complainant by accused no.1 ? Or by demand of the complainant, gift was sent by accused no.2 to the complainant ? Further,

as per the evidence of the complainant, at 9 p.m. on the date of the raid, when accused no.1 came into the house of the complainant, he welcomed accused no.1 and asked him to sit with him on the cot and accused no.1 sat with the complainant. Thereafter, he removed the wrapper of the gift box and took out the clock from the packet and then adjusted the time and started it and told the complainant to accept the said clock and requested to close the case of his leave fare bill. Further, accused no.1 told him that he (accused no.1) and Kothari (accused no.2) both went personally to the shop and purchased the said clock. He further told him that its cost is Rs.150/-. Whether this conversation is possible between accused no.1 and the complainant, as discussed above, as accused no.1 is a peon and complainant is a Class II Officer ? When accused no.1 went to the complainant to hand over the gift box to him, at the most, he could have requested him to look into his case. It is strange that a Class II Officer asks a peon to sit with him and also indulge in such a fashion as mentioned above. As in the morning, accused no.1 told the complainant that as per the the telephonic

conversation the complainant had with Mr Kothari, he brought this gift for handing over to him, then again it was not required for accused no.1 to repeat the same conversation/request. This evidence of the complainant regarding the manner in which the incident took place and manner in which the conversation took place between accused no.1 and the complainant, is highly improbable and no prudent man can believe such a story. So, the evidence of the complainant is neither found trustworthy nor inspire confidence of the court. On the contrary, it creates doubt whether both the accused have in connivance with each other, offered the muddamal clock to favour accused no.1. As discussed above, there is all possibility that on demand by the complainant, accused no.2 might have sent the gift through accused no.1 for the complainant. As discussed earlier, the complainant must have been suspicious about the arrangement of trap by accused no.1 and 2 and at that point of time, he might have changed his mind and subsequently belatedly, he went to the ACB office for lodging the complaint. It is incumbent upon the complainant to inform Mr Mehta, the superior

officer of the complainant who was present in the office when accused no.1 had visited the office of the complainant with the packet which was to be offered as bribe. If he had informed Mr Mehta about the incident, then things would have been different. So, in the opinion of this court, the prosecution has miserably failed to prove its case beyond reasonable doubt against both the accused with regard to offering of the muddamal clock to the complainant.

15. As far as the evidence of PW 4, the Investigating Officer is concerned, it is pertinent to note that the complainant went at about 5 p.m. to the office of the ACB and lodged the complaint. The complaint was recorded by the police officer of ACB. There was ample time for the ACB officer to call panchas but it is rather strange to note that after recording the complaint, the ACB officer did not call the panchas but immediately, along with the complainant and other staff members, he had gone by jeep to Bapunagar cross road and from there two panchas were called and preliminary panchnama was drawn in jeep itself. It is found that in an unusual

manner, panchas were called and preliminary panchnama was drawn.

16. As per evidence of PW 3, Babubhai Mohanbhai, panch witness, panchnama was not drawn according to the instructions of panchas but it was already written in the jeep itself before reaching the residence of the complainant. At whose instructions the panchnama was drawn etc. he could not say. He, very specifically stated in his cross examination that the complainant in the beginning said “saru” (good) and then told him to bring tea. Other than this, nothing else was said by the complainant. According to the evidence of this witness, before handing over the clock to the complainant-Mr Raval by accused no.2, the complainant brought water for accused no.1. Now, if we rely upon the evidence of panch witness, it is not at all believable that a Class II Officer brought a glass of water for the peon in presence of other ACB officers and panch No.2. As per the evidence of PW 1-complainant, whether any conversation took place regarding giving of gift to the complainant by

accused no.1 in the presence of panch no.1 is doubtful. As discussed above, in his evidence, panch no.1 specifically stated that no such conversation took place. Even if we rely upon the evidence of PW 1, in his chief examination, the complainant-PW 1 stated that accused no.1 and accused no.2 brought a watch for him as per the conversation which took place between accused no.1 and the complainant, there is major contradiction between the evidence of complainant - PW 1 and the panch no.1. So, the evidence of panch witness also does not inspire confidence of this court.

17. PW 5, Shailesh Mahendrabhai, from whose shop the muddamal clock was purchased, in his evidence at Exh. 51, specifically stated that accused no.2-Kothari had never gone to his shop but as per the say of accused no.1, he prepared bill in the name of accused no.2-Kothari. By his evidence, it seems, to strengthen its case, the prosecution tried to place reliance upon the evidence of this witness, but it is not much important that who had purchased the clock, whether it is purchased by accused no.1 or accused

no.2. As discussed above, the evidence of the complainant does not inspire confidence and the prosecution has not proved beyond reasonable doubt that the muddamal clock was handed over to the complainant by way of bribe or on demand by the complainant it was handed over to him.

18. In view of the aforesaid discussion, I am of the firm opinion that the learned trial Judge having committed grave error, is not justified in passing the impugned judgment and order of conviction and sentence against the present appellants. Consequently, these appeals are liable to be allowed.

19. For the foregoing reasons, both the appeals are allowed. The judgment and order of conviction and sentence dated 29.5.1989 delivered by the learned Special Judge, Ahmedabad City in Special Case No.7 of 1988 is quashed and set aside. The appellants are acquitted from the charges levelled against them. The appellants are directed to be released forthwith if not required in any other case. The muddamal article be disposed of in terms of the directions given by

the trial court in the impugned judgment. Bail bonds stand cancelled. Fine, if any, paid shall be refunded.

[M.D. SHAH, J.]

msp